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No. 88-479

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARION D. CAMPBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and the court of appeals erred in finding that two conspiracy charges in a single indictment constituted separate offenses for purposes of the Double Jeopardy Clause.

2. Whether collateral estoppel bars the government from reprosecuting petitioner for conspiracy to distribute drugs, on which a jury was unable to reach a verdict, after the same jury acquitted petitioner of conspiracy to commit extortion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 852 F.2d 1456. The opinion of the district court (Pet. App. 26a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1988. The petition for a writ of certiorari was filed on September 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATEMENT

In 1986 a federal grand jury in the Eastern District of Kentucky charged petitioner with conspiracy to commit extortion under color of official right and three substantive extortion counts, in violation of the Hobbs Act, 18 U.S.C. 1951. The grand jury also charged that petitioner

conspired to distribute cocaine and marijuana and to possess those substances with intent to distribute them, in violation of 21 U.S.C. 846. After a jury trial, petitioner was acquitted of the three substantive extortion counts and of the count charging him with conspiracy to commit extortion. The jury was unable to reach a verdict on the count charging petitioner with conspiracy to distribute cocaine and marijuana, and a mistrial was declared as to that count.

This case arises from petitioner's motion to dismiss the remaining count on double jeopardy grounds. The district court denied the motion to dismiss (Pet. App. 26a-30a), and on petitioner's interlocutory appeal the court of appeals affirmed and remanded the case for trial (Pet. App. 1a-25a).

1. During the period relevant to the charged offenses, petitioner was a high-ranking officer of the Kentucky State Police. Co-defendant Roger Benton was the Sheriff of Morgan County, Kentucky. Co-defendant Gene Allen was the Morgan County Judge.

Count 1 of the original 18-count indictment charged petitioner, Benton, Allen, and two others with conspiracy to commit extortion between January 1, 1985, and February 11, 1986. In particular, Count 1 alleged that the five defendants obtained and attempted to obtain money and cocaine under color of official right from an undercover FBI agent posing as a cocaine distributor. Under the scheme alleged in Count 1, the defendants agreed to obtain money and cocaine from the agent in return for extending police protection to the agent's drug operation. The conspirators agreed to inform the undercover agent about any state or local investigation that might affect his cocaine distribution and to permit the agent to fly loads of cocaine into the county and to distribute the contraband there.

Count 16 of the original indictment charged the same five individuals with a conspiracy to possess and distribute cocaine and marijuana within the same time period as Count 1, in violation of 21 U.S.C. 846.

Three of the charged conspirators, including Judge Allen, pleaded guilty and testified for the government at the trial of petitioner and co-defendant Roger Benton. Their testimony and the other evidence at trial, which are outlined in the opinion below (Pet. App. 4a-7a) and set out in the government's brief in the court of appeals (at 3-16), showed that in late 1983 petitioner approached Judge Allen to discuss how they could profit from the highly lucrative drug dealing in which others were engaged. As Allen explained, "everytime I was with [petitioner] we discussed the drug business" (VI Tr. 24; Pet. App. 4a-5a). The two initially planned to obtain drugs from a corrupt Florida sheriff and fly them into Morgan County, Kentucky. In the fall of 1984, petitioner and Allen met with co-defendant Titus Frederick, whom they believed to have connections in the drug business, in an effort to locate a supplier of drugs for their planned distribution. The three men also met frequently with a local attorney to discuss their hopes of making money in the drug business, and they tried unsuccessfully to obtain financial backing for the venture from the attorney. *Ibid.*

The conspirators then turned to Houston E. McNeal, an FBI undercover agent who was posing as a drug dealer. McNeal agreed to pay the five conspirators $5000 a month for protection and to avoid arrest. He paid $2500 initially to one of the co-defendants, who said he would give the money to petitioner. Subsequently, McNeal brought two kilograms of cocaine into Morgan County, and he then sold the cocaine at Allen's home to purported buyers who in fact were other FBI agents. After the sale, McNeal gave

$2500 to Allen and another conspirator and left an additional $2500 for petitioner. Less than two months later, McNeal paid Allen another $5000 and gave him an additional $5000 to be paid to petitioner. One week after those payments McNeal gave $5000 to Benton for protection. Pet. App. 5a-6a.

In his defense, petitioner testified that he engaged in the conduct proved at trial not as part of an illegal scheme, but because he was conducting his own investigation of McNeal. Sheriff Benton also presented that defense. Pet. App. 6a. Co-defendant Steve Allen (the son of Judge Allen), however, testified that after their arrests his father and Sheriff Benton said that "they were going to say they were conducting an investigation on their own" and would see if petitioner would go along with that plan (V Tr. 95). In addition, other police officers and the county prosecutor explained that neither man had informed them of their alleged investigation (Pet. App. 6a-7a). Moreover, a state police officer stated that petitioner had asked him to testify that the two had discussed the investigation; when the officer replied that he could not "get on the stand and commit perjury," petitioner responded, "Big * * * deal, I am looking at ninety-five years." IX Tr. 44.

The jury convicted Benton of both conspiracies and all substantive extortion counts. At the same time, it acquitted petitioner of the extortion conspiracy charge (Count 1) and the three substantive extortion counts. The jury was unable to reach a verdict as to petitioner on the drug distribution conspiracy charged in Count 16.

2. After the government moved to set a date for a retrial on the remaining conspiracy charge, petitioner moved to dismiss that count on double jeopardy grounds. While the motion was pending the government obtained a superseding indictment that amended the time frame of the original charged drug conspiracy and deleted reference

to the planned distribution of marijuana. Whereas Count 16 had originally alleged a conspiracy existing from January 1, 1985, through February 11, 1986, the superseding indictment dated the conspiracy from November 1, 1983, through March 12, 1986. The new count also deleted reference to Benton (who had been convicted on Count 16) and to defendant Steve Allen, the son of Judge Allen.

The district court denied the motion (Pet. App. 26a-30a). The court found that the two offenses charged in Count 1 and Count 16 constituted separate conspiracies and that charging petitioner with the two conspiracy offenses therefore did not violate the Double Jeopardy Clause. The court pointed out that the two conspiracy offenses with which petitioner was charged have very different elements and that there is no evidence that Congress did not intend to permit separate punishment for violations of the two conspiracy statutes. In addition, the court noted that the evidence supporting the two conspiracy charges was quite different. There was extensive, corroborated testimony, the court pointed out, that petitioner had discussed and planned a drug distribution operation in the Morgan County area. By contrast, the only testimony that petitioner indirectly received money from Agent McNeal was the testimony of a charged co-conspirator, who stated that he passed McNeal's money to petitioner. Pet. App. 28a-29a.

The district court then rejected petitioner's collateral estoppel claim. Based on the evidence at trial, the court stated that "it is obvious that the jury could have found that the Defendant Campbell did not receive nor solicit any money, but nevertheless could have conspired to possess with intent to distribute or to distribute marijuana and cocaine." Pet. App. 29a-30a.

3. The court of appeals affirmed (Pet. App. 1a-25a). It agreed with the district court that the indictment charged two separate conspiracies (Pet. App. 12a-14a). The court of appeals also rejected petitioner's claim that his acquittal on the Hobbs Act conspiracy charge collaterally estopped the government from reprosecuting him on the drug conspiracy charge (Pet. App. 18a). The court determined that the jury's acquittal on the extortion conspiracy count could well have been based on the conclusion that petitioner did not agree to commit extortion. Given the alternative explanations for the jury's verdict on the extortion conspiracy count, the court of appeals held that it could not find "with definite assurance, and by clear evidence, that the jury found a fact in [petitioner's] favor, which is also a necessary element of" the pending drug conspiracy charge (Pet. App. 19a). In the absence of such a finding, the court concluded, collateral estoppel does not bar petitioner's retrial.

ARGUMENT

1. Petitioner first contends (Pet. 7-18) that the two conspiracies alleged in the indictment constitute the "same offense" for purposes of the Double Jeopardy Clause and that he cannot be prosecuted on the drug distribution conspiracy charge after having been acquitted on the extortion conspiracy charge.

a. Even if petitioner were right in his contention that the two conspiracies charged in this case arose from a single agreement, there would be no double jeopardy bar to the prosecution of that agreement as two separate crimes. In *Albernaz* v. *United States*, 450 U.S. 333 (1981), this Court held that a single agreement to import marijuana and then distribute it domestically could be prosecuted and punished as two separate crimes: conspiracy to import marijuana, in violation of 21 U.S.C. 963; and

conspiracy to distribute marijuana, in violation of 21 U.S.C. 846. The Court made clear (450 U.S. at 338-342, 344 n.3) that separate conspiracy statutes can support separate charges in a case such as this one. Thus, when the different conspiracy statutes proscribe agreements with different unlawful ends, and each statute requires proof of a fact that the other does not, the Double Jeopardy Clause permits prosecution and punishment under both statutes unless Congress affirmatively indicates that it does not intend cumulative punishment under the two statutes. Here, the two statutes proscribing the charged conspiracies each require proof of a fact that the other does not,[1] and petitioner has pointed to nothing in the statutory language or legislative history to negate the presumption that Congress intended to allow a single agreement to be prosecuted under both statutes. Petitioner's contention is therefore wrong because, by analogy to *Albernaz,* a single agreement to extort and to distribute drugs can be prosecuted under both 18 U.S.C. 1951 and 21 U.S.C. 846 without violating the Double Jeopardy Clause. See also *United States* v. *Woodward,* 469 U.S. 105, 107-109 (1985); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 787-789 (1946).

Petitioner apparently seeks to avoid the effect of the rule in *Albernaz* by characterizing this as a case involving multiple prosecutions, whereas *Albernaz* involved multiple charges in a single indictment. That suggestion fails for two reasons. First, because each of the conspiracy statutes contains at least one element not contained in the other, the two conspiracy charges satisfy the requirements of *Blockburger* v. *United States,* 284 U.S. 299 (1932), and could therefore be separately charged in separate indict-

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[1] Petitioner concedes as much (Pet. 13).

ments resulting in separate trials. See *Garrett* v. *United States*, 471 U.S. 773, 778-779 (1985). Second, this is not a case involving "successive prosecutions," but rather a case involving a single prosecution that has resulted in two trials because of a mistrial granted on the drug conspiracy count. Petitioner has therefore been placed in jeopardy only once (see *Richardson* v. *United States*, 468 U.S. 317, 325 (1984)); the retrial on the drug conspiracy charge is part of the single proceeding against petitioner. This case is thus analogous to *Ohio* v. *Johnson*, 467 U.S. 493 (1984), which this Court held to involve only a single proceeding for double jeopardy purposes, even though the State sought to try the defendant on certain counts of an indictment after he had been convicted on others (see 467 U.S. at 500-502). As the Court explained in *Johnson*, "the principles of finality and prevention of prosecutorial overreaching" (*id.* at 501) do not apply when the defendant is subject to continuing prosecution "on the remaining charges brought in the indictment" (*ibid.*). The mistrial declared after a hung jury on the drug conspiracy count entitles the government to a new trial at which it will have "one complete opportunity to convict those who have violated its laws." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978).

Petitioner's position is wrong for the further reason that the evidence in this case established two separate agreements. The evidence showed that petitioner and Allen initially conspired between themselves and with others to make money distributing drugs well before the possibility of extorting money or drugs from McNeal arose. After their efforts to obtain drugs from a Florida source and financing from a local attorney failed, some or all of the various conspirators then entered into a separate agreement to extort McNeal as a potential source of either cocaine or money with which to buy a supply of drugs for

distribution.[2] In light of the facts proved at trial, the two charged conspiracies involve substantially different activities and thus could properly be inferred to be the product of separate agreements even if the two conspiracy counts were not based on different statutory provisions.[3]

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[2] Although the government charged and sought to prove that all of the individuals involved in the drug conspiracy, including petitioner, were also involved in the extortion conspiracy, the jury's verdict suggests that it did not believe beyond a reasonable doubt that petitioner was a party to the latter conspiracy. Thus, despite the government's allegation that petitioner and his co-conspirators all participated in both conspiracies, the proof at trial, in the eyes of the jury, showed otherwise.

[3] The "totality of the circumstances" test that the courts below applied to determine whether the two agreements were separate is not materially different from the test used by the other circuits. See *United States* v. *Ciancaglini*, No. 88-1438 (3d Cir. Oct. 13, 1988), slip op. 11; *United States* v. *MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States* v. *Korfant*, 771 F.2d 660, 662 (2d Cir. 1985); *United States* v. *Thomas*, 759 F.2d 659, 661-662 (8th Cir. 1985); *United States* v. *Phillips*, 664 F.2d 971, 1006 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States* v. *Marable*, 578 F.2d 151, 154 (5th Cir. 1978). Petitioner claims that the decision of the court of appeals in this case conflicts with the decision of the Third Circuit in *United States* v. *Liotard*, 817 F.2d 1074 (1987), because in *Liotard* the court of appeals declined to consider the fact that the two conspiracy counts at issue charged different object offenses (see 817 F.2d at 1078 n.7). There is no conflict between the circuits on this point, for two reasons. First, *Liotard* involved different *object* offenses, not different conspiracy provisions, as in this case. Both prosecutions in *Liotard* were brought under the same conspiracy statute. Second, the Third Circuit recently declined to follow *Liotard*'s limitation in *United States* v. *Ciancaglini*, No. 88-1438 (Oct. 13, 1988), slip op. 11. In *Ciancaglini*, the court suggested that the use of different object offenses could be considered in determining whether separate agreements were charged, as long as the use of different object offenses did not disguise the fact that both alleged conspiracies were based on the same agreement. That rule is no different in practical effect from the rule applied in every circuit to

b. Petitioner raises as a separate argument (Pet. 11-18) the claim that the charged drug conspiracy is a lesser included offense of the extortion conspiracy of which he was acquitted. This contention is simply a restatement in a different form of his claim that the two conspiracies are the "same offense" for double jeopardy purposes. Like the first claim, the "lesser included offense" contention is foreclosed by *Albernaz* v. *United States, supra.* Even if there was only one agreement in this case, neither charged conspiracy can be regarded as a lesser included offense of the other, because the offenses contain distinctly different elements. See *United States* v. *Woodward, supra.*

In addition, this argument is based on a false factual premise. Contrary to petitioner's assertion (Pet. 14), the Hobbs Act conspiracy and the conspiracy to distribute drugs are not factually identical as charged. First, different time frames are spelled out in the extortion conspiracy count and the superseding drug count. Second, contrary to petitioner's contention, the alleged effect on interstate commerce in the Hobbs Act count is not the defendants' "intentional distribution of cocaine." Count 1 charges that the defendants conspired "to obstruct, delay and affect commerce by extortion, that is, by obtaining and attempting to obtain money and cocaine from Houston E. McNeal with his consent, under color of official right." The extortion conspiracy count further alleges that the defendants would offer protection to McNeal for *his* distribution activities in exchange for payment. That is a far cry from the drug conspiracy allegation that the defendants conspired together to possess and distribute drugs themselves. Finally, although Count 1 alleges that the extorted payment to the defendants would

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determine whether two charges brought under the same conspiracy provision constitute one offense or two.

be "money and cocaine," that allegation is plainly not identical to the charge in the drug conspiracy count that the defendants agreed to "possess with intent to distribute controlled substances." Indeed, the allegation in the extortion conspiracy count that the defendants would be paid off in drugs is substantively quite different from an allegation that they would possess drugs for distribution to others.

Nor are the two conspiracy counts based on the same evidence, as petitioner asserts (Pet. 17; see also Pet. 19-20). Petitioner states that "*all* of the evidence that even remotely ties petitioner to the events identified in the original indictment is directly related to the alleged effort to extort Special Agent McNeal" (Pet. 20). Yet the superseding indictment dates back to a time well before Agent McNeal was in the picture. Moreover, the evidence at trial overwhelmingly demonstrated a persistent and ongoing agreement to secure drugs for distribution, and the events involving Agent McNeal occurred during only one phase of the defendants' overall drug activities. As is clear from the facts stated in the opinion of the court of appeals, the evidence concerning the drug distribution conspiracy was largely independent of the extortion conspiracy evidence, and the government could easily prove the Section 846 count without ever mentioning the charged extortion. Thus, to the extent that petitioner suggests a circuit conflict on the "same evidence" standard (see Pet. 17-18), this case does not present a factual basis for resolving that issue.

2. Finally, petitioner claims (Pet. 18-20) that the principles of collateral estoppel bar his impending retrial on drug conspiracy charges.

The facts of this case do not support petitioner's collateral estoppel claim. As petitioner acknowledges, collateral estoppel prohibits a second trial only if the jury

necessarily decided an issue of fact in his favor without which the pending charge cannot be proved. *Ashe* v. *Swenson,* 397 U.S. 436, 443-445 (1970); *United States* v. *Bennett,* 836 F.2d 1314, 1316 (11th Cir. 1988), cert. denied, No. 87-1751 (June 20, 1988); *United States* v. *Head,* 697 F.2d 1200, 1205 (4th Cir. 1982). The defendant bears the burden of identifying the factual issues necessarily decided at the first trial that would preclude his retrial on the remaining charges. *United States* v. *Ragins,* 840 F.2d 1184, 1194 (4th Cir. 1988); *United States* v. *Bennett,* 836 F.2d at 1317 n.1; *United States* v. *Gentile,* 816 F.2d 1157, 1162 (7th Cir. 1987); see also Pet. App. 18a. Petitioner has not identified any element of the drug conspiracy charge that the jury necessarily found in his favor in its extortion conspiracy verdict. He has therefore failed to satisfy his burden of establishing a collateral estoppel bar to retrial.

The district court and the court of appeals correctly found that the acquittal of the Hobbs Act conspiracy might reflect merely that the jury accepted petitioner's defense that he was investigating McNeal or that it did not believe beyond a reasonable doubt that petitioner agreed to extort or actually extorted McNeal. At the same time, the court below correctly concluded that the verdict is not a rejection of the government's case concerning the conspirators' separate and preexisting plan to sell drugs on a large scale. See Pet. App. 29a-30a, 18a-20a. That hypothesis is supported by the lack of evidence corroborating petitioner's accomplice's testimony that money was given to petitioner. Since the explanation is reasonable and petitioner identifies no other facts necessarily found by the jury, petitioner is not entitled to invoke the principles of collateral estoppel.

Moreover, petitioner treats this case as if it were one in which the government had charged him with the extortion

conspiracy, had failed in its effort to win a conviction on that charge, and had then brought a new charge of drug conspiracy. Petitioner's argument ignores the critical differences between a successive-prosecution case of the sort he imagines and the case actually before the Court, which involves a proposed retrial of previously tried charges on which the defendant was *not* acquitted. If the jury necessarily had decided a factual issue relating to the drug conspiracy in petitioner's favor, it would have acquitted him on that charge. But it did not do so. Thus in this case, as in *United States* v. *Bennett,* 836 F.2d at 1317 (footnote omitted),

> [T]he jury verdict bespeaks a distinction between the two conspiracies. The trial judge charged the jury on two conspiracies, and the very fact that the jury did not acquit [petitioner] on all * * * counts and instead disagreed on [one] of the counts implies that at least some members of the jury did not interpret the conspiracies as one. Because the split jury verdict would cohere on the basis that the jury bought [petitioner's] defense for the one conspiracy but not for the other, [it follows] that the jury did not necessarily decide [petitioner's] involvement in the distribution scheme. Therefore, * * * the doctrine of collateral estoppel will not bar retrial * * *.

We submit that the doctrine of collateral estoppel should never bar the retrial of counts that were tried—but did not result in acquittal—before the same jury as the counts giving rise to the collateral estoppel claim. If (as we contend and the lower courts held in this case) there is a logically consistent way for the jury to have acquitted on one count but not on another, then the jury did not necessarily determine facts that require acquittal on the unacquitted counts, and collateral estoppel does not bar

retrial of the unacquitted counts. On the other hand, if (as petitioner contends in this case) there is *no* logically consistent way for the jury to have acquitted on one count but not on another, ~~it did not~~, then we would know that "the same jury reached inconsistent results." *United States* v. *Powell,* 469 U.S. 57, 68 (1984). "[O]nce that is established principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" (*ibid.*). In such a situation, the defendant has no right to argue that the verdicts of acquittal were "the one[s] the jury 'really meant' " (*ibid.*).[4]

Both of the possible hypotheses lead readily to the same conclusion: there is no collateral estoppel bar to a retrial on the unacquitted counts. A defendant who wins a partial victory in the jury room cannot by operation of law transform that partial victory into the total victory that the first jury refused to give him. See *United States* v. *Citron,* 853 F.2d 1055, 1058 (2d Cir. 1988); *United States* v. *Bennett,* 836 F.2d at 1317; *Hess* v. *Medlock,* 820 F.2d 1368, 1374 (4th Cir. 1987); *United States* v. *Price,* 750 F.2d 363, 366 (5th Cir.), cert. denied, 473 U.S. 904 (1985).[5]

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[4] Petitioner faults the court of appeals for suggesting that the jury might have acquitted him on the extortion conspiracy charges because of leniency (Pet. 20 n.14 (citing Pet. App. 19a)). Petitioner might be right to take the court to task if this were a successive-prosecution case in which the jury that acquitted him of the extortion-related charges had not also heard the drug-related charges, but this is not that case. In a case in which the jury may have acted inconsistently, it is quite proper—indeed, it is imperative—for courts to take into account the possibility that an acquittal was based on jury lenity. See *Powell,* 469 U.S. at 63, 65-66 (quoting *Dunn* v. *United States,* 284 U.S. 390, 393 (1932)).

[5] In *Ohio* v. *Johnson,* 467 U.S. at 500 n.9, this Court wrote that, "in a case such as this, where the State has made no effort to prosecute

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." The present case, like *Ohio* v. *Johnson,* is one in which the government has made no effort to prosecute the charges of Hobbs Act conspiracy and drug conspiracy seriatim. Rather, the government has been forced to try the latter charge separately only because it was not, but the former charge was, resolved when the two were pursued together. It follows from *Ohio* v. *Johnson* that the principles of collateral estoppel are inapplicable here. See also *United States* v. *Ashley Transfer & Storage Co.,* No. 87-5153 (4th Cir. Oct. 3, 1988), slip op. 14.

Petitioner describes this case repeatedly as one involving successive prosecutions (Pet. 6, 15, 16, 17), but, as we have noted, that description no more fits this case than it did *Ohio* v. *Johnson*—which this Court expressly regarded as a case in which the State had not sought to prosecute the charges seriatim. The prosecutions for conspiracy to extort and for conspiracy to distribute drugs in this case, like the prosecutions for murder and for manslaughter in *Ohio* v. *Johnson, supra,* were eventually separated from each other because of what happened in the trial court when the government sought to pursue the charges together, but the element of potential government harassment and oppression that inheres in the notion of successive prosecutions is entirely absent.

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